STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EMILIO SALOMON VASQUEZ,

Defendant-Appellant.

UNPUBLISHED
June 26, 1998

No. 195915
Washtenaw Circuit Court
LC No. 95-004710 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to forty-five to eighty-five years' imprisonment for second-degree murder, consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first contends that he was denied his Sixth Amendment right of confrontation, US Const, Am VI; Const 1963, art 1, § 20, when the trial court, over objection, allowed plaintiff to read to the jury the preliminary examination testimony of a witness who was unavailable at trial, but forbade the introduction, for impeachment, of the witness' two theft-related convictions. The court noted that these convictions had not been elicited when the witness testified at defendant's preliminary examination and concluded that they were therefore barred by MRE 609(a), which provides in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination . . . .

We find it unnecessary to address the constitutional issue propounded by defendant. Even assuming arguendo the validity of his constitutional argument, violations of the right to cross-examination are subject to a two-step harmless-error analysis. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). First, in view of the substantial evidence implicating defendant in the crimes,

any error in failing to admit the impeachment evidence is harmless beyond a reasonable doubt because it had no effect on the verdict. *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972); *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). Second, the error, if any, is not so offensive to the maintenance of a sound judicial process that it can never be regarded as harmless. *Robinson, supra* at 563; *Minor, supra* at 685-686.

Furthermore, because defendant has failed to satisfy the criteria set forth in *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), we reject his argument that he was denied the effective assistance of counsel at his preliminary examination.

Defendant next contends that prejudicial error occurred because he was not present when prospective jurors who expressed prior knowledge of the case were examined in chambers regarding the nature of their knowledge, and when the jury, during deliberations, returned with questions and a request for a transcript. The effect of a defendant's absence at certain stages of trial is a question of law that this Court reviews de novo. *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285, 293; 565 NW2d 650 (1997). Here, the record discloses that the trial court and counsel agreed in advance to the voir dire procedure used. The proper test for determining whether a defendant's absence from a part of a trial requires reversal is whether there is any reasonable possibility of prejudice resulting from the absence. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977). See also *People v Carroll*, 396 Mich 408; 240 NW2d 722 (1976), in which the Court affirmed the defendants' convictions despite their absence during the trial court's in-chambers questioning of jurors regarding suspected tainting of the jury's impartiality. Because no reasonable probability of prejudice resulted from defendant's absence during in-chambers voir dire, there was no prejudicial error.

Assuming that defendant was absent when the jury interrupted its deliberations with questions and a transcript request, no error occurred. The record reveals that defense counsel agreed with the trial court's response to each jury inquiry. Our Supreme Court has held that a defendant's absence did not result in prejudicial error when the jury, during deliberations, returned and requested a reiteration of instructions, *People v LaMunion*, 64 Mich 709, 713-715; 31 NW 593 (1887), or of testimony given during trial, *People v Carey*, 125 Mich 535, 541; 84 NW 1087 (1901), or asked whether certain testimony had been stricken, *People v Jaskulski*, 236 Mich 237, 239; 210 NW 234 (1926), or engaged in a colloquy with the court with defense counsel present, *People v Burkhart*, 165 Mich 240, 246-247; 130 NW 597 (1911). Pursuant to this authority, as well as *Morgan*, *supra*, no basis for reversal exists, nor was defendant denied the effective assistance of trial counsel.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski